OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

June 25, 2014

To:

Hon. Mark T. Slate
Circuit Court Judge
Green Lake County Courthouse
P.O. Box 3188
Green Lake, WI 54941

Susan J. Krueger
Clerk of Circuit Court
Green Lake County Courthouse
P.O. Box 3188
Green Lake, WI 54941

Timothy T. O'Connell
O'Connell Law Office
P.O. Box 1625
Green Bay, WI 54305-1625

Kyle J. Sargent
District Attorney
P.O. Box 3188
Green Lake, WI 54941-3188

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Matthew D. Yohann 458134
Fox Lake Corr. Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

You are hereby notified that the Court has entered the following opinion and order:

2013AP216-CRNM State of Wisconsin v. Matthew D. Yohann (L.C. # 2011CF78)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Matthew D. Yohann appeals from a judgment of conviction entered after a jury found him guilty of the following eleven counts: burglary; felony bail jumping; seven counts of felony theft (special facts, theft of a firearm); possessing a firearm as a convicted felon; and misdemeanor theft. Yohann's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),[1] and ***Anders v. California***, 386 U.S. 738 (1967). After receiving from

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Yohann a response which relied on facts outside the record, we ordered appointed counsel to file a supplemental no-merit report. On April 7, 2014, appointed counsel filed a supplemental no-merit report addressing our concerns. Yohann has not filed a response to the supplemental no-merit report. We determine that the judgment of conviction erroneously indicates that Yohann's convictions were obtained using the WIS. STAT. § 939.05, party to a crime (PTAC) modifier.[2] This is a scrivener's error and we order that upon remittitur, the judgment shall be modified to remove any reference to § 939.05. *See* ***State v. Prihoda***, 2000 WI 123 ¶¶15, 27, 239 Wis. 2d 244, 618 N.W.2d 857. Upon consideration of the original and supplemental no-merit reports, Yohann's response, and an independent review of the record, we conclude that the judgment, as modified, may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

A criminal complaint was first filed in connection with this incident in Green Lake County Circuit Court Case No. 2011CF46. Yohann was bound over for trial following a preliminary hearing held on July 11, 2011. The case was dismissed on Yohann's motion prior to arraignment on the ground that the information was untimely filed. Thereafter, the State filed a new complaint and the circuit court case was assigned number 2011CF78. A second preliminary hearing was conducted on March 8, 2012.

At Yohann's jury trial, the victim testified that he returned home from work at about 2:30 p.m. on October 28, 2010, and discovered that someone had broken into and taken items from his house and outdoor shed. Among the items stolen were seven firearms, a Bear Whitetail

[2] The record reflects that the trial court granted the State's pretrial motion to strike the WIS. STAT. § 939.05 modifier as to each count.

Hunter bow, a Craftsman chainsaw with a Poulan bar, and Sears brand circular and miter saws. The victim's neighbor testified that on the day of the burglary, he saw "a white four door, an older car, possibly a Dodge Neon" parked between the victim's house and sheds. The neighbor testified that he saw an individual loading boxes into the car and observed some totes, boxes, and what looked to be gun cases sitting next to the white car.

The victim testified that between August and October 2010, he saw a "Plymouth or Dodge Neon, a white one, 4-door" driving around his neighborhood approximately twenty times. He testified that on one occasion, the vehicle pulled into his driveway and the driver, whom he identified as Yohann, asked questions about where and when the victim worked and whether he kept firearms on the premises. The victim testified that after the burglary, in December 2010, he saw the white car and Yohann at a Kwik Trip convenience store. He took down the license plate number and immediately called the police.

Police officers testified that they ran the license plate number and learned the car was registered to Yohann. Around this same time, police located the stolen chainsaw, miter saw, and hunter's bow at area pawnshops and learned they had been pawned by Yohann and his wife about one week after the burglary. The police testified that Yohann admitted to pawning the items but insisted that he had purchased them from a stranger he met online through Craigslist. Yohann was unable to provide further details or documentation of the purchase.

The jury found Yohann guilty of all eleven counts. At sentencing, the trial court imposed a ten-year bifurcated sentence on count one, with five years of initial confinement and five years of extended supervision. On the remaining ten counts, the court withheld sentence in favor of probation.

The no-merit and supplemental no-merit reports address whether any arguably meritorious claims arise from the preliminary hearing proceedings, the sufficiency of the evidence at trial, trial counsel's performance, or the trial court's exercise of discretion at sentencing.

Pretrial Proceedings

The no-merit report first addresses whether a potentially meritorious issue arises from the trial court's decision to allow arguably inadmissible hearsay at Yohann's preliminary hearing. Even assuming that improper evidence was introduced and considered at Yohann's preliminary hearing, we agree with counsel's conclusion that under ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991), a fair and errorless trial cures any error in the preliminary hearing. This means that any relief must be sought prior to trial, such as through interlocutory appeal. *See* ***id.***; ***State v. DeRango***, 229 Wis. 2d 1, 9, 599 N.W.2d 27 (Ct. App. 1999). There is no arguably meritorious challenge to the trial court's bindover decision.

In his response to the no-merit report, Yohann asks the court to consider whether the filing of the eleven-count complaint in the second prosecution constitutes prosecutorial misconduct.[3] Yohann asserts that "[w]hen the new District Attorney in Green Lake refiled the charges he added [various charges] because I refused to take his plea offer…." We conclude that Yohann's assertions do not give rise to any arguably meritorious claim. First, the State actually added the seven theft-of-firearm charges to the information filed in No. 2011CF46. Thus,

[3] It appears from the electronic circuit court docket entries that the complaint in No. 2011CF46 charged Yohann with two felonies, burglary and bail jumping.

Yohann was charged with the additional counts prior to the dismissal in No. 2011CF46, before the filing of the complaint in No. 2011CF78. When filing an information after arraignment, the State may permissibly and frequently does add charges as it learns more about the facts of a criminal incident. Second, even assuming the truth of Yohann's assertion that the State added charges based on his refusal to accept a plea offer, this does not give rise to an arguably meritorious claim of prosecutorial vindictiveness. "In reviewing a prosecutorial vindictiveness claim, we are mindful of the fact that a prosecutor has great discretion in charging decisions and is generally answerable for those decisions to the people of the state and not the courts." ***State v. Johnson***, 2000 WI 12, ¶16, 232 Wis. 2d 679, 605 N.W.2d 846 (citations omitted). This broad discretion extends to a prosecutor's determination of which offenses to charge, "under which statute to charge, and whether to charge a single count or multiple counts when the conduct may be viewed as one continuing offense." ***State v. Krueger***, 224 Wis. 2d 59, 67-68, 588 N.W.2d 921 (1999). There is no presumption of vindictiveness when a prosecutor increases charges prior to trial based on a defendant's refusal to accept a plea offer. *See* ***Bordenkircher v. Hayes***, 434 U.S. 357, 358-59, 364-65 (1978) (holding that the prosecutor's conduct did not violate the defendant's due process rights where the prosecutor carried out an explicit threat to file more serious charges against the defendant if the defendant refused to plead guilty to a less serious offense).

Sufficiency of the Evidence

The no-merit report addresses whether there was sufficient credible evidence to support the guilty verdicts. The report sets forth the applicable standard of review and the evidence satisfying the elements of each crime and concludes that there is no arguably meritorious challenge to the sufficiency of the evidence supporting Yohann's convictions. In his response,

Yohann questions how he could be convicted of possessing a firearm as a felon and theft of a firearm "if there's no proof that [he] ever possessed these items?" On review, "an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the [S]tate and the conviction, is so [insufficient] in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Hayes***, 2004 WI 80, ¶56, 273 Wis. 2d 1, 681 N.W.2d 203 (citation omitted). Here, the evidence presented to the jury was that a number of items were stolen from a residence as part of a single burglary. Among the stolen items were seven firearms, a bow, and three saws. It was undisputed that Yohann pawned three of the stolen items about one week after the burglary. There was evidence that Yohann's vehicle was parked at the residence during the time of the burglary. The victim testified that he saw Yohann's car driving around the neighborhood in the months leading up to the burglary and that on one of these occasions, Yohann pulled into his driveway and asked questions about the victim's work hours, whether he possessed any firearms, and where they were stored. A jury is free to piece together the bits of testimony it finds credible to construct a chronicle of the circumstances surrounding the crime. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Further, "[f]acts may be inferred by a jury from the objective evidence in a case." ***Shelley v. State***, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979). We agree with counsel's analysis and conclusion that there was sufficient evidence to support each conviction, including the firearms-related offenses.

Ineffective Assistance of Counsel

In his response to the no-merit report, Yohann asserts that trial counsel was ineffective for failing to impeach the victim at trial with his allegedly inconsistent testimony from the original preliminary hearing held on July 11, 2011.[4] Yohann points us to the victim's trial testimony that he did not remember noticing the car's license plate until he saw it again in December 2010 at the Kwik Trip:

> [PROSECUTOR]: And when you saw this vehicle at the scene up by your house, do you remember any portion of the license plates? Did you try to get that at that point?
>
> [VICTIM]: At that point, no.
>
> [PROSECUTOR]: Did you ever notice any portion of the license plates when you were out there?
>
> [VICTIM]: I don't think so.

Yohann asserts that trial counsel should have impeached the victim with the following testimony from the July 11, 2011 preliminary hearing:

> [TRIAL COUNSEL]: Okay. But there was no reason that you took the license plate number—any time before you noticed the license plates any time before you were at Kwik Trip?
>
> [VICTIM]: Well, we had a conversation, my son and I did, about how I thought it was odd that it started out with letters instead of numbers, and in the old days you used to just mix the numbers and

[4] As part of his supplemental no-merit report, appointed counsel provides the transcript of the July 11, 2011 preliminary hearing filed in circuit court case 2011CF46. Counsel moves this court to supplement the appellate record in this case with the transcript. The transcript was never made part of the circuit court record in the present circuit court case No. 2011CF78. Therefore, though we consider the transcript as part of our decision in this case, we deny counsel's motion to supplement the record on appeal. The July 11, 2011 preliminary hearing transcript is more appropriately considered as part of the supplemental no-merit report.

> letters and everything up on the license plate, and then his was LSL, and I just thought it was odd, you know.

We agree with appointed counsel's analysis and conclusion that there is no merit to any argument that trial counsel was ineffective for failing to question the victim at trial about his earlier testimony that he noticed aspects of the license plate prior to the burglary. At both proceedings, the victim testified that he took down the plate number after recognizing the car at the Kwik Trip, and that he immediately provided the information to the police. As explained in the supplemental no-merit report, any slight difference in the victim's testimony was not material or relevant to the issues at trial.[5]

Yohann also claims that trial counsel was ineffective for failing to discover and question the victim and his neighbor about the fact that in the past, Yohann's father lived in close proximity to the victim's property. Yohann writes:

> I didn't know this at the time of my trial but my father … lived less than 500 yards from [the victim's] residence from about 1995 until he died in October of 2009. The white Plymouth Neon that I owned was my father's car until he died in 2009. My father lived very close to [the victim]. Why didn't he recognize the car because it was my father's who was a close neighbor of [the victim].[6]

[5] In his response, Yohann alleges that at the July 11, 2011 preliminary hearing, the victim testified "that he remembered my license plate number from when he saw me and another person at his house a week or so before the burglary" and that at trial, the victim "changed his story" to state that he first made note of the license plate number during the Kwik Trip encounter. This mischaracterizes the victim's July 11, 2011 testimony. Though the victim said he noticed that the license plate was "odd" during his driveway conversation with Yohann, he consistently testified that he first took down Yohann's full license plate number at the Kwik Trip. The victim did not, as Yohann complains, "change[] his testimony" about how he obtained and provided police with the plate information.

[6] In arguing that the victim should have recognized his father's car, Yohann points us to the victim's 2012 preliminary hearing testimony that he had lived at his residence for about four years.

Yohann concedes that when trial counsel showed him pictures of the victim's property, he told her only that he "was somewhat familiar with the area because my father lived close to the road that [the victim] lived on." Yohann now asserts that he "didn't realize how close together they actually lived" and that trial counsel was somehow ineffective for failing to discover the precise distance between the properties and to "point out the fact that my father owned my Plymouth Neon before it became mine." Yohann concludes that if this information "was presented at my trial I believe it could've changed the outcome and maybe explained some things to the jury."

We agree with appointed counsel's conclusion that Yohann's assertions do not give rise to an arguably meritorious claim of ineffective assistance of counsel. First, trial counsel cannot be faulted for failing to discover the precise distance between Yohann's deceased father's former residence and the victim's property. *See* ***Strickland v. Washington***, 466 U.S. 668, 691 (1984) (the "reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."); ***State v. Nielsen***, 2001 WI App 192, ¶23, 247 Wis. 2d 466, 634 N.W.2d 325 (trial counsel was not deficient for failing to discover information that was readily available to the defendant). Second, the location of the father's prior residence does not contradict the victim's testimony that when he saw Yohann driving around in October 2010, he did not recognize the white car as belonging to any of his neighbors. Third, whether or not the victim was ever familiar with or remembered Yohann's father has no bearing on the testimony concerning his driveway conversation with Yohann, or that he frequently saw Yohann driving around the neighborhood in the fall of 2010.[7] There is no reasonable probability that but for

[7] Similarly, trial counsel was not arguably ineffective for failing to ask the victim's neighbor whether he knew or remembered Yohann's father. Any questions concerning the neighbor's familiarity with Yohann's father are irrelevant to his observations on the day of the burglary.

counsel's allegedly deficient performance, the result of the trial proceeding would have been different. ***Strickland***, 466 U.S. at 694.

Finally,[8] Yohann asserts that at trial, police testified "that fingerprints and DNA evidence could not be recovered from the crime scene because [police and the victim] touched items at the scene before the scene could be processed [,]" and that trial counsel "should've brought this up at trial because the evidence at the scene was tampered with due to improper detective work at the scene." However, trial counsel did cross-examine the police and the victim on precisely this issue and pointed out in closing argument that the State "took a long time trying to explain" why the police did not collect or follow up on potential physical evidence, such as fingerprints, tire tracks and a foot print. Yohann has failed to establish any arguably meritorious challenge to trial counsel's performance concerning the allegedly "improper detective work at the scene."

Sentencing

Appellate counsel's no-merit report concludes that the trial court properly exercised its discretion at sentencing. We agree. In fashioning the sentence, the court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The trial court also discussed the relevant sentencing factors under ***State v. Gallion***, 2004 WI 42, ¶¶40-44, 270 Wis. 2d 535, 678 N.W.2d 197. Further, we cannot conclude that the sentence imposed was unduly harsh. A sentence may be considered unduly harsh or unconscionable only when it is "so

[8] In his response, Yohann also questions whether appointed counsel provided all relevant transcripts. In the supplemental no-merit report, appointed counsel states that he "sent all transcripts as (continued)

excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh. ***Id.*** at ¶¶31-32 (citation omitted). Here, the ten-year bifurcated sentence was well below the maximum sentence available considering all eleven convictions, and is not so excessive or unusual as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our review of the record discloses no other potential issues for appeal.[9] Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to represent Yohann further in this appeal. Therefore,

IT IS ORDERED that the appellant's motion to supplement the appellate record with the July 11, 2011 hearing transcript is denied.

IT IS FURTHER ORDERED that upon remittitur, the judgment of conviction shall be modified as described herein.

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listed on the Statement on Transcript." Yohann has not responded, and we therefore accept counsel's assertion as true.

[9] In addition to the issues discussed in counsel's no-merit and supplemental no-merit reports, we have independently reviewed the jury selection, evidentiary objections, Yohann's stipulation to certain essential elements and decision not to testify, the closing arguments of counsel, and the jury instructions. *See* ***State v. Allen***, 2010 WI 89, ¶82, 328 Wis. 2d 1, 786 N.W.2d 124 (it is difficult to know the nature and extent of the court of appeals' examination of the record "when the court does not enumerate possible issues that it reviewed and rejected in its no-merit opinion)".

IT IS FURTHER ORDERED that the judgment of conviction as modified is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Timothy T. O'Connell is relieved from further representing Matthew D. Yohann in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals